

**Galen v Air & Liquid Sys. Corp.**

2012 NY Slip Op 30039(U)

January 9, 2012

Supreme Court, New York County

Docket Number: 190335/10

Judge: Sherry Klein Heitler

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER

*Justice*

PART 30

Index Number : 190335/2010  
GALEN, SAM  
vs.  
AIR & LIQUID SYSTEMS  
SEQUENCE NUMBER : 003  
SUMMARY JUDGMENT

INDEX NO. 190335/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 003

*(AUGUST PUMP)*

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s) \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s) \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s) \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the  
memorandum decision dated 1-9-12

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

## FILED

JAN 11 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1-9-12

  
\_\_\_\_\_, J.S.C.  
**HON. SHERRY KLEIN HEITLER**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 30

----- X  
SAM GALEN,

Plaintiffs,

- against -

AIR & LIQUID SYSTEMS CORP. AS SUCCESSOR  
BY MERGER TO BUFFALO PUMPS, INC.; et al.

Defendants.  
----- X

Index No. 190335/10  
Motion Seq. 003

**DECISION & ORDER**

**FILED**

**JAN 11 2012**

**SHERRY KLEIN HEITLER, J.:**

NEW YORK  
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendant Aurora Pump Company (hereinafter "Aurora") moves for summary judgment pursuant to CPLR § 3212 dismissing plaintiff's complaint and all cross-claims against it. For the reasons set forth below, the motion is denied.

**BACKGROUND**

Plaintiff Sam Galen, now deceased, worked as an apprentice rigger and later as a 1st class rigger at the Brooklyn Navy Yard from 1952 to 1961. Mr. Galen testified<sup>1</sup> that during that time he was exposed to asbestos from, among other things, insulation that was installed on different types of equipment, including pumps, while working on at least 17 different United States Navy vessels, including the USS Constellation, USS Independence, and USS Franklin D. Roosevelt ("FDR"). Mr. Galen's job responsibilities required him to prepare pumps and other equipment that was to be mounted on ships for assembly at the Brooklyn Navy Yard.

Aurora seeks summary judgment on the ground that Mr. Galen did not identify any product

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<sup>1</sup> Mr. Galen was deposed on September 21, 2010, September 22, 2010, October 19, 2010, October 21, 2010, and October 29, 2010. A copy of his deposition transcript is submitted as plaintiff's exhibit 1 ("Deposition").

manufactured, sold, distributed or otherwise supplied by it as a source of his exposure. Aurora argues that any circumstantial evidence showing that Aurora pumps were manufactured for use aboard the USS Constellation, USS Independence, and USS FDR is insufficient to establish a time and place connection between Mr. Galen and Aurora equipment so as to infer any liability herein. Aurora further contends that sales records for the USS FDR show that pumps arrived at the construction site too late to have been maneuvered by Mr. Galen. Plaintiff argues that there is sufficient documentary evidence to show that Aurora pumps were present onboard the USS Independence, USS Constellation, and USS FDR during the relevant time period and as such triable issues of fact exist with regard to Aurora's liability.

### DISCUSSION

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law, and must tender sufficient evidence to demonstrate the absence of any material issue of fact. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); CPLR § 3212(b). In asbestos-related litigation, once the movant has made a *prima facie* showing of its entitlement to summary judgment, the plaintiff must then demonstrate that he was exposed to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). While the plaintiff is not required to show the precise cause of his damages, he is required to show facts and conditions from which the defendant's liability may be reasonably inferred. *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995).

In this case, Aurora has met its *prima facie* burden by demonstrating that Mr. Galen did not explicitly identify any of its products as a source of his exposure. Nevertheless, plaintiff has met his burden by submitting documentary evidence which consists, *inter alia*, of invoices and

4] "recommendations and proposals" which indicate that numerous Aurora pumps were installed aboard the USS Constellation during the relevant time period, including centrifugal, fresh water, and chilled drinking water circulating pumps, among others. Also submitted is evidence that Aurora provided replacement gaskets and sleeves to the Brooklyn Navy Yard during the time period when plaintiff worked there as a rigger.

In this regard, Mr. Galen testified as follows (Deposition pp. 118, 138-42, objections omitted):

Q: I want to know, this is a very specific question, can you tell me the names of the ships where you performed this work?

A: Yeah.

Q: Go ahead.

A: The Bennington, the Wasp, the Hornet, the Ticonderoga, the Constellation, the Independence. I think the Antietam, I don't remember that. The Intrepid, the one that's the museum out here. The Duluth, I think the Duluth.

\* \* \* \*

Q. Let's move on to the pumps. Do you believe you were exposed to asbestos in any way from work in the chain fall gang associated with the pumps?

A. Absolutely.

Q. How so?

A. Because when you're breaking them apart or lifting them - if you're repairing them, if you're repairing them the machinist, the machinists are doing the repair but you're doing the -- you're the one that's hooking up and lifting it, bringing it into position and they break it apart with their tools and you have to be there to maneuver the item.

Q: Are you working on the pump personally?

A: No.

Q: Or pumps.

A: No, no, no. I'm only hooking it up. Whoever works on the pump, it's usually a machinist who works on the pump. But I'm there while they're working on it.

Q. And what aspect of the machinist's work on the pumps do you believe caused you to be exposed to asbestos?

- A. When I'm wrapping the outside of the pump to make a lift, my equipment is cracking the asbestos covering.
- Q: Where is the covering on the pump?
- A: On the outside of it.
- Q: Around the entire pump or just a portion of it?
- A: Usually most of it, most of it, on the pipe end of it. And then you have to wrap it around the pipe in order to grip, get a grip. When you wrap it around the pipe, as soon as you take a strain, you're cracking the asbestos and it becomes airborne.

\* \* \* \*

- Q. And on which vessel would you be doing this work with the pumps?
- A. On most all of them.
- Q. When you say "most all of them," you're talking about the ten aircraft carriers we mentioned earlier?
- A. On all the aircraft carriers we worked on pumps.

\* \* \* \*

- Q. Were any of these aircraft carriers being built at the yard?
- A. Yeah, the Saratoga... the Independence... The Constellation but that went on fire...

Mr. Galen further testified that he worked with and around pumps in every part of the ships where he was stationed.

In light of the evidence presented herein, this court finds Judge Freedman's holding in *McKeon v A.W. Chesterton, et al.*, Index No. 113240/05 (Sup. Ct. NY Cty. Dec. 15, 2006, n.o.r.), which case is strikingly similar to the case at bar, to be highly persuasive. In that case, Joseph McKeon served as a Brooklyn Navy Yard rigger who worked in the vicinity of steamfitters during virtually the same time period as Mr. Galen. Like Mr. Galen, Mr. McKeon failed to identify Aurora pumps as the source of his exposure. However, the *McKeon* court denied summary judgment, finding that as there were "at least 38 Aurora pumps" aboard the USS Constellation, there was sufficient circumstantial evidence to raise triable issues of fact. Here, as in *McKeon*, there could be a reasonable inference that Mr. Galen was exposed to Aurora pumps that were installed aboard the USS Constellation while Mr. Galen was

stationed at the Brooklyn Navy Yard. See *McKeon, supra*; see also *Reid, supra*, 212 AD2d at 463.

Aurora relies on several decisions that involve Navy ship records which may be distinguished from this case on their facts. In *Kenah v A.W. Chesterson*, Index 104405/2007 (Sup. Ct. NY Cty. Mar. 6, 2008) the plaintiff failed to present the same level of inculpatory testimony as that provided by Mr. Galen. Likewise, in *Trautman v A.O. Smith Water Products*, Index No. 4847/2008 (Sup. Ct. Monroe Cty. Dec. 22, 2008), while plaintiff was able to show that pumps were on board the ship during the relevant time period, he could not show that they were ever disassembled, serviced or replaced in his presence. By contrast, Mr. Galen testified that he was present during the installation and repair of pumps on board many ships, including the USS Constellation.

This court's decision in *Diglio v A.W. Chesterton Co.*, Index No. 190166/10 (Sup. Ct. N.Y. Cty. Aug. 9, 2011, n.o.r.) is also inapposite. In that case, it was held that even though the record may have been sufficient to place defendant's asbestos-containing products at the plaintiff's job site, it was not sufficient to show that the plaintiff was exposed to asbestos therefrom. To the contrary, Mr. Galen testified that he worked in the "same dust filled room" with the machinists who were working on dismantled pumps. Deposition, pp. 131-32.

I therefore find that plaintiffs have met their burden of proof and summary judgment is inappropriate. See *Cawein, supra*, 203 AD2d at 106.

Accordingly, it is hereby

ORDERED that Aurora Pump Co.'s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

**FILED**

**JAN 11 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

DATED: January 9, 2012

  
\_\_\_\_\_  
SHERRY KLEIN HEITLER  
J.S.C.